

China and U.S. Trade: Recent Export Regulations

JOHN F. MCKENZIE*

I. Introduction

In May, 1983, Secretary of Commerce Malcolm Baldrige announced that the Reagan Administration intended to relax the United States' restrictions on trade with the People's Republic of China, in order to permit the export of high technology electronic and telecommunications equipment to China, which theretofore had been restricted for national security purposes. On November 23, 1983, the Office of Export Administration of the Department of Commerce published Amendments¹ to the Export Administration Regulations,² which implement this policy of liberalization of trade with China. The means by which the Amendments implement this new trade policy is to reclassify the People's Republic of China from Country Group "P" to Country Group "V" for export control purposes.³ The effect of this reclassification is to bring export licensing requirements and policies for proposed exports to China substantially into conformance with licensing requirements and policies for proposed exports to Western Europe, Africa, the Middle East and noncommunist Asia. The Amendments, however, make a number of very significant exceptions to the general policy of bringing export controls for China into conformance with export controls for noncommunist countries. This article discusses the overall effects of the reclassification, as well as the important exceptions to the general policy of conformance between export controls for China and export controls for noncommunist countries.

*Mr. McKenzie practices law in San Francisco.

¹48 Fed. Reg. 53064-71 (1983).

²15 C.F.R. pts. 368-99.

³See 48 Fed. Reg. 53064, *amending* 15 C.F.R. pt. 370, Supp. No. 1.

II. Reclassification of China from Country Group "P" to Country Group "V"

The Export Administration Act authorizes the President to impose controls on the export of United States origin goods and technical data (a) to protect the national security of the United States; (b) to further United States foreign policy objectives; and (c) to restrict the export of goods (particularly key raw materials) which are in short supply in the United States.⁴ The export control program is embodied in the Export Administration Regulations, and is implemented by a licensing procedure which is administered by the Office of Export Administration of the Department of Commerce. Specific authorization, in the form of an individual validated export license, is required for the export of any *controlled commodity* or *technical data* to any destination to which the controls are applicable.⁵ For purposes of administering this licensing program, the nations of the world have been divided into eight (now seven) country groups, with validated licensing requirements and licensing policies varying considerably from country group to country group. The classification of nations into the eight country groups immediately before the issuance of the Amendments is set forth in Appendix I.

Classification of a country in a particular country group determines both the validated licensing requirements and the licensing policy for proposed exports to that country. Thus, for a limited number of commodities on the Commodity Control List a validated export license is required for exports to destinations in Country Groups P, Q, S, W, Y and Z, but is *not* required for exports to destinations in Country Groups T and V. By reclassifying the People's Republic of China from Country Group P to Country Group V, the validated licensing requirement has been removed for the export of such commodities to China.⁶

With respect to the vast majority of commodities that are subject to export controls for *national security reasons* (generally, the items identified by the code letters "A" and "B" in the Commodity Control List), a validated export license is required for export to any destination, except Canada. The Office of Export Administration's policy in granting or denying validated license applications varies considerably by country group. Validated export license applications for proposed exports of commodities controlled for national security purposes to destinations in Country Groups T and V are generally reviewed on the basis of whether there is a significant

⁴50 U.S.C. App. §§ 2402(2), 2404(a)(1), 2405(a)(1), 2406(a)(1).

⁵The commodities that are subject to control are specified in the Commodity Control List, 15 C.F.R. § 399.1, Supp. No. 1. The technical data controls are set forth in 15 C.F.R. pt. 379.

⁶With the reclassification of China, Country Group P has been eliminated. See 48 Fed. Reg. 53064, *amending* 15 C.F.R. § 370, Supp. No. 1.

risk that the commodities will be diverted from their stated destination to a country that is potentially hostile to the United States (i.e., nations in Country Groups Q, S, W, Y and Z). In contrast, validated license applications for proposed exports of commodities controlled for national security purposes to destinations in Country Groups Q, S, W and Y are reviewed on the basis of whether the commodities may make a significant contribution to the military potential of the country of destination.⁷ Thus, by reclassifying the People's Republic of China from Country Group P to Country Group V, the standard of review for most validated license applications for proposed exports to China has been changed dramatically. In most cases, the Office of Export Administration will consider whether there is a risk that the commodities will be reexported to a potentially hostile nation (such as North Korea),⁸ rather than whether the commodities will make a significant contribution to Chinese military potential.⁹

In implementing the new trade policy with China, the Office of Export Administration has divided the commodities for which validated license applications are most frequently received into three lists, the "green" list, the "yellow" list, and the "red" list. Items on the green list, which are identified in various new advisory notes to the Commodity Control List,¹⁰ will be subject to the new standard of review and will generally be authorized for export to China.¹¹ Validated license applications to export items on the yellow and red lists, which involve higher levels of technology and which may be more directly adapted to military uses, will be reviewed by both the

⁷See 15 C.F.R. § 385.2(a)(1). The nations of Country Group Z are subject to an absolute embargo. See *id.* § 385.1.

⁸See 48 Fed. Reg. 53067, adding 15 C.F.R. § 385.4(g).

⁹Under the Amendments, validated license applications for exports of controlled commodities to China may be approved even if the end-user is a military entity. Validated license applications for proposed exports to China of commodities having direct military applications, such as items relating to nuclear weapons and delivery systems, electronic and anti-submarine warfare, intelligence gathering, power projection and air superiority, will, however, generally be denied. See 48 Fed. Reg. 53067, amending 15 C.F.R. § 385.4(c)(1).

¹⁰The advisory notes identify those commodities in the following categories for which validated licenses for exports to China will generally be granted: (i) machinery and equipment for the manufacture of electronic equipment (ECCN 1355A); (ii) electronic measuring, calibrating and testing equipment (ECCN 1529A); (iii) electronic test equipment with embedded computers or microprocessors (ECCN 4529B); (iv) integrated circuits and microcircuits (ECCN 1564A); (v) electronic computers and peripherals (ECCN 1565A); (vi) recording and reproducing equipment, including recording media (ECCN 1572A); and (vii) oscilloscopes and components (ECCN 1584A).

¹¹Validated license applications for proposed exports to China of items on the green list may be approved directly by the Office of Export Administration, and will *not* require interagency review by the Department of Defense. It is anticipated that approximately 75 percent of all validated license applications for proposed exports of controlled commodities to China will involve commodities on the green list. Thus, for example, computers having a processing data rate of up to 155Mbits/second are on the green list. This should cover virtually all 16 bit microcomputers and 75 to 80 percent of medium scale mainframe computers.

Office of Export Administration and the Department of Defense under the more stringent standard of whether the commodities may make a significant contribution to Chinese military potential, and with respect to commodities on the red list (which is classified), license applications will generally be denied.

III. Major Distinctions in Export Licensing Requirements Between China and the Other Countries of Country Group V

As noted above, although the People's Republic of China has been reclassified from Country Group "P" to Country Group "V", there remain a number of important differences between the controls on exports to China and controls on exports to other countries in Country Group V. The most significant of these distinctions are the following.

A. USE OF THE GENERAL LICENSE GLV

Part 371 of the Export Administration Regulations establishes a series of general export licenses which permit the export of United States origin commodities to some or all destinations without the necessity of a specific validated export license. Among these general licenses is general license GLV, which permits the export of *controlled* commodities in limited amounts (generally \$1,000 or less) to destinations in Country Groups T and V.¹² Although, prior to the issuance of the Amendments, the regulatory provision governing general license GLV contemplated the use of that general license for limited value exports to China, in fact the general license GLV value limit for exports to Country Group P (China) for most commodities on the Commodity Control List was *zero*.

For commodities identified by the code letter "B" on the Commodity Control List (*i.e.*, commodities subject to unilateral controls for all destinations, except Canada), general license GLV will be available for limited value shipments to China, in the same manner that general license GLV may be used for limited value exports to other Country Group T or V destinations. In contrast, the restrictions on the use of general license GLV for the export of "A" items (*i.e.*, commodities subject to multilateral controls) to China has been retained, notwithstanding the reclassification of China for most export control purposes. With the inclusion of China in Country

¹²15 C.F.R. § 371.5. The Commodity Control List specifies a general license GLV maximum value for each entry. This value limit is \$100, \$250, \$500 or \$1,000, depending upon the particular commodity. Certain commodities, however, which are controlled for nuclear non-proliferation reasons, have a general license GLV value limit of *zero* for all destinations. See generally *id.* § 399.1, Supp. No. 1.

Group V, the Amendments also make corresponding modifications to the general license GLV value limit provisions of the "A" items on the Commodity Control List, to provide that the GLV value limit for proposed exports to the People's Republic of China remains *zero*.¹³ This restriction is consistent with the Office of Export Administration's policy, manifested at several points in the Amendments, of continuing to examine each proposed export of controlled commodities to China on a case-by-case basis. In addition, because COCOM approval requirements for proposed exports to China remain unchanged,¹⁴ the restriction on the use of general license GLV for the export of "A" items to China has been retained in furtherance of the United States' obligations to its COCOM partners.

B. USE OF THE DISTRIBUTION LICENSE SPECIAL LICENSING PROCEDURE

The necessity of obtaining an individual validated license for each proposed export of a controlled commodity to any destination to which the controls are applicable (all destinations except Canada, in the case of "A" and "B" items) can be a time consuming and expensive process. As a result, in order to facilitate multiple export transactions involving commodities for which a validated license is required, Part 373 of the Export Administration Regulations creates a series of special licensing procedures which may be utilized, under certain specified conditions and in limited circumstances, in lieu of individual validated export licenses. Of these special licensing procedures, the most important is the distribution license. The distribution license permits the exporter to make repeated exports over a period of one year (subject to renewal for up to two years) of controlled commodities to approved consignees in specified destinations, pursuant to an international marketing program.¹⁵

Heretofore, the distribution licensing procedure has been available for exports of controlled commodities to approved consignees in Country Groups T and V *only* (thus excluding China—Country Group P). The Amendments *retain* this exclusion of China from the list of eligible countries under the distribution license special licensing procedure.¹⁶ This restriction is consistent with the Office of Export Administration's policy, noted above, of examining proposed exports of controlled commodities to China on a case-by-case basis.

¹³See 48 Fed. Reg. 53068–69, amending various entries in the Commodity Control List, 15 C.F.R. § 399.1, Supp. No. 1.

¹⁴See Section III.C. of this article, *infra*.

¹⁵15 C.F.R. § 373.3.

¹⁶48 Fed. Reg. 53065, amending 15 C.F.R. §§ 372.2(b)(3), 373.3(a)(1)(ii).

C. COCOM APPROVAL

The United States participates in a program of multinational export control, along with Belgium, Canada, Denmark, France, West Germany, Greece, Italy, Japan, Luxembourg, the Netherlands, Norway, Portugal, Turkey and the United Kingdom. This system of multinational controls is administered by an informal Coordinating Committee (COCOM) which reviews proposed exports of multilaterally controlled commodities (i.e., commodities identified by the code letter "A" on the Commodity Control List) to consignees in the communist countries of Eastern Europe, the Soviet Union and the People's Republic of China. Thus, even after the Office of Export Administration has determined to grant a validated license for a proposed export of an "A" item to one of these destinations, the license application must be reviewed and approved by COCOM before the validated license will be issued.¹⁷

Because the requirement of COCOM approval of validated license applications for the export of certain controlled commodities to China is based upon an international (albeit informal) agreement, the Amendments leave the COCOM approval requirements for exports to China unchanged.¹⁸ As a result of the continuing applicability of the COCOM approval requirements, validated license applications for proposed exports of "A" items to China are likely to take considerably longer in processing than are validated license applications for proposed exports of such items to other Country Group V destinations. Apparently, however, United States representatives to COCOM have had a number of discussions with their foreign counterparts in COCOM about granting favorable consideration to license applications for exports to China which have been tentatively approved by the United States pursuant to the liberalized policy embodied in the Amendments.

D. SPECIAL DOCUMENTATION FOR
COMPUTER EXPORTS

Section 376.10 of the Export Administration Regulations has established various special documentation requirements for validated license applications for proposed exports of computers (ECCN 1565A) to any destination in Country Groups P, Q, W and Y. Under section 376.10 an applicant for a validated license to export computers to one of these destinations must submit (i) the computers' parameters specifications on form ITA-6031P; (ii) documentation identifying the parties to the transaction, the proposed location and end use of the computers, and the technical justification for the

¹⁷See generally 15 C.F.R. § 370.13(1).

¹⁸48 Fed. Reg. 53064, *amending* 15 C.F.R. §§ 370.11(c), 370.13(1).

end-user's need for the equipment; (iii) detailed information about the software to be supplied for use with the computers; (iv) appropriate assurances against diversion of the computers from the stated destination and end use; and (v) the end-user's agreement to visitation rights by representatives of the exporting firm to confirm that the equipment has not been improperly diverted to an unauthorized destination or use.¹⁹ The Amendments leave these special documentation requirements for proposed computer exports to China *unchanged*. Thus, notwithstanding the reclassification of China into Country Group V, exporters that propose to export computers to China will still be required to submit ITA-6031P and the other prescribed documentation in conjunction with their validated export license applications,²⁰ whereas such documentation need *not* be submitted in conjunction with license applications for proposed computer exports to other destinations in Country Group V.

E. SPECIAL DOCUMENTATION—CERTAIN MACHINE TOOL AND NUMERICAL CONTROLS EXPORTS

Like section 376.10 with respect to computers, section 376.11 of the Export Administration Regulations has prescribed additional information that must accompany any validated license application for a proposed export to any destination in Country Groups P, Q, W and Y, of those machine tools and numerical controls identified in the Commodity Control List entry ECCN 1091A.²¹ These additional information requirements are generally not applicable for proposed machine tool and numerical controls exports to destinations in Country Group V, but with the inclusion of China into Country Group V, section 376.11 has been modified by the Amendments to *retain* the special information requirements for proposed exports of those items to China.²²

F. TECHNICAL DATA EXPORT CONTROLS

As noted above, the Export Administration Act and the Export Administration Regulations provide for control of the export not only of commod-

¹⁹15 C.F.R. § 376.10. The foregoing is merely a summary of the special documentation requirements for computer exports to the controlled destinations. In fact, the section requires the exporter to provide a substantial amount of information in connection with a validated license application to export computers to one of the destinations in question.

²⁰48 Fed. Reg. 53066. Although Country Group P is eliminated by the reclassification of China, section 376.10 is correspondingly amended to provide specifically that the special documentation requirements remain applicable to proposed computer exports to the People's Republic of China.

²¹15 C.F.R. § 376.11.

²²48 Fed. Reg. 53066, *amending*, 15 C.F.R. § 376.11. The amendment is effected by simply deleting Country Group "P" and adding "the People's Republic of China" to section 376.11.

ities but also technical data.²³ In order to facilitate the international exchange of technology, however, under section 379.4 of the Export Administration Regulations, most technical data, except those data having certain direct strategic applications, may be exported to destinations in Country Groups T and V (except Afghanistan) under a general license GTDR.²⁴ Thus, the exporter that proposes to export or license its technology to an end-user in a country included in Country Group T or V generally may make the export without a validated export license, although it may be necessary for the exporter to obtain a letter of assurance from the end-user that neither the technical data nor the direct product thereof, will be reexported to a controlled destination (heretofore, the nations in Country Groups P, Q, S, W, Y, Z and Afghanistan).²⁵

In contrast, a validated export license has been required for almost all proposed exports of technical data to destinations in Country Groups P, Q, S, W, Y and Z, as well as Afghanistan. Section 379.4(b) of the Export Administration Regulations provides that general license GTDR may not be utilized for technical data exports to destinations in Country Groups P, Q, W or Y, or to Afghanistan,²⁶ except (i) for the export of operating and maintenance technical data for commodities that have been licensed for export from the United States; and (ii) for the export of limited types of sales and marketing technical data in support of an actual quotation, bid or offer to sell commodities.²⁷

²³See 15 C.F.R. pt. 379. It should be noted that the Export Administration Regulations treat all computer software as technical data for export control purposes. See *id.*, § 379.4(g).

²⁴See *id.*, § 379.4. The types of technical data for which a validated license is required for export to destinations in Country Groups T and V are specified in sections 379.4(c) and 379.4(d) of the Export Administration Regulations. These technical data relate to the production and delivery of nuclear weapons, airborne navigation and guidance systems, civil aircraft, and various types of submersible watercraft.

²⁵The various written assurance requirements are set forth in sections 379.4(f)(1), 379.4(f)(2) and 379.4(g) (relating to software) of the Regulations. Although Country Group P has been eliminated with the reclassification of China, the written assurance provisions of section 379.4(f) retain the requirement that the consignee of technical data exported under general license GTDR provide written assurance that the technical data and its direct product will be diverted neither to the People's Republic of China nor any other controlled destination, without authorization of the United States government. See 48 Fed. Reg. 53066, *amending* 15 C.F.R. §§ 379.4(f), 379.5(e).

²⁶A validated license is required for virtually all exports of proprietary technical data (*i.e.*, technical data that is not in the public domain and is therefore not exportable under a general license GTDA) to destinations in Country Group S (Libya) or Country Group Z (Cuba, Kampuchea, North Korea, Vietnam). 15 C.F.R. 379.4(a). Validated license applications to export technical data to any destination in Country Group Z will be summarily denied. See *id.*, § 385.1(a).

²⁷*Id.*, § 379.4(b). Under this section of the Regulations, the only technical data that may be exported to a destination in Country Group P, Q, W, or Y are (a) manuals, instruction sheets or blueprints which are (i) sent as part of a transaction involving, and are directly related to, a commodity licensed for export to the specific destination and consignee, (ii) sent no later than one year after shipment of the commodity, (iii) generally delivered with the commodity, as a

Thus, heretofore, a validated license has been required for virtually all transfers of proprietary technical data to China, except under the narrow general license GTDR conditions specified above. The Amendments modify the broad restriction on the export of technical data to China under general license GTDR, but do *not* bring the requirements for technical data exports to China into full conformance with the requirements for technical data exports to other destinations in Country Group V. Although general license GTDR may now be used for some technical data exports to China, this general license is *not* available for the export to China of any technical data related to any commodity that is controlled for national security, nuclear non-proliferation or crime control reasons (essentially the items on the Commodity Control List identified by code letters "A" and "B").²⁸ The Office of Export Administration's objective is, once again, to be able to examine proposed technical data exports to China on a case-by-case basis.

This continuing restriction on the use of general license GTDR for technical data exports to China may be of particular importance to exporters of "unbundled" computer software. Software is treated as technical data for export control purposes, and is, of course, related to and used with computers, items which are controlled for national security purposes (i.e., ECCN 1565A). Thus, a validated export license will still be required for the export of essentially all unbundled computer software to China.²⁹

IV. Conclusion

The Amendments and the new licensing policy adopted by the Office of Export Administration represent a major relaxation of United States trade policy and may open up significant new export opportunities for United States firms, particularly in the high technology electronics area. The Amendments do not bring export controls with respect to China into full

matter of established business practice, (iv) necessary for the assembly, installation, maintenance, repair or operation of the commodity, and (v) not related to production, manufacture or construction of the commodity; or (b) technical data supporting an actual quotation, bid or offer to sell a commodity, provided that (i) the commodity is not identified as an "A" item on the Commodity Control List (i.e., subject to multilateral controls), (ii) the technical data are of a type customarily transmitted to a prospective customer in connection with a quotation or bid, in accordance with established business practice, and (iii) the technical data do not disclose the detailed design, production, manufacture or means of reconstruction of the quoted commodity or its product.

²⁸48 Fed. Reg. 53066, adding 15 C.F.R. § 379.4(i).

²⁹Pre-programmed systems software, and applications software that is to be exported to China with computers for which a validated export license has been obtained, should be exportable under general license GTDR as operating and maintenance technical data. As noted in Section III.D. of this article, *supra*, however, detailed information about all such software must accompany an application for a validated license to export computers to China. See 15 C.F.R. § 376.10(a)(1)(vii), as modified by 48 Fed. Reg. 53066.

conformance with export controls with respect to other Country Group V destinations, as exporters and commentators initially anticipated when Secretary Baldrige announced the new trade policy in May. This nonconformance is particularly true with respect to proposed exports of commodities embodying the highest levels of technology, (i.e., items on the "yellow" and "red" lists) as well as proposed exports of technical data, to the People's Republic of China. Exporters that seek to pursue the new opportunities for trade with China should, therefore, be particularly sensitive to the differences between export control requirements and policies with respect to the United States' major Western trading partners.

Appendix I

Country Groups

Canada	
Country Group T	North and South America and the nations of the Caribbean (except Cuba)
Country Group V	Western Europe, the Middle East, Africa, noncommunist Asia, Australia, New Zealand
Country Group P	People's Republic of China (prior to November 23, 1983)
Country Group Q	Romania
Country Group S	Libya
Country Group W	Poland, Hungary
Country Group Y	Soviet Union, the communist countries of Eastern Europe, Laos, Mongolia
Country Group Z	Cuba, Kampuchea, North Korea, Vietnam